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NO. 84-241

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WILLIAM GARVEY, Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Appendix A: Opinion, Malmed, J.

Appendix B: Commonwealth v. Garvey, No. 713, Philadelphia 1982 (Pa. Super. filed Jan. 13, 1984) (unpublished memorandum opinion)

Appendix C: Pennsylvania Supreme Court's Denials of Petitions for Allowance of Appeal and for Reconsideration

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Appendix F: Post Conviction Hearing Act Petition

* For the convenience of the Court, the above Appendices have been lodged with the Clerk of Court. Where appropriate and helpful, respondent will cite to these appendices as well as to the record where the original documents can be found.

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OPINIONS BELOW

The Opinion of the trial court, Commonwealth v. William Garvey, Nos. 1809-1811, Philadelphia Court of Common Pleas, March Term 1980, Malmed, J., was filed February 3, 1983 (Appendix A). The unpublished memorandum opinion of the Pennsylvania Superior Court, Commonwealth v. Garvey, No. 713, Philadelphia 1982 was filed Janury 13, 1984 (Appendix B); the Superior Court's per curiam order of affirmance is now published at 470 A.2d 1018 (Pa. Super. 1984). The Supreme Court of Pennsylvania's per curiam denial, without opinion, of petitioner's Petition for Allowance of Appeal and its denial of petitioner's Petition for Leave to File Petition for Reconsideration, No. 66 E.D. Allocatur Dkt., 1984 were filed May 11, 1984 and July 2, 1984, respectively (Appendix C).

JURISDICTION

Petitioner seeks review by writ of certiorari pursuant to 28 U.S.C. §1254(1), which permits review of cases in the federal courts of appeal. Since this case has never been presented to a federal court, the Commonwealth assumes that petitioner intended to seek review pursuant to 28 U.S.C §1257(3) (review of state court decisions). For the reasons stated below, however, the Commonwealth urges this Court to find that Petitioner has not properly invoked this Court's jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law;...

STATEMENT OF THE CASE

A Philadelphia jury convicted petitioner, William Garvey, of third degree murder, and the trial court, the Honorable Edwin S. Malmed, sentenced him to two and one-half to ten years imprisonment for killing Joseph Wilkowski with a single, forceful blow to Wilkowski's head.

Factual Statement:

Petitioner and Wilkowski were among hundreds of people gathered in a hotel, drinking and partying after a professional football game. (N.T. 1.51-.52). Wilkowski encountered petitioner, whom he did not know, in a crowded hallway. (N.T. 1.70-.71). Several eyewitnesses said that petitioner, a strapping neighborhood league footballer, was someone "ready to get into a fight" and "revved up" (N.T. 2.57-.59, 4.99, 4.101). As Wilkowski turned toward a friend, petitioner dealt a single forceful blow to the right side of Wilkowski's head,

knocking him to the floor. (N.T. 4.100).

Petitioner stood over him momentarily, then turned and exited hurriedly with his friends (N.T. 2.61, 2.66-.68). One of petitioner's friends said, "You hit him pretty hard," and petitioner replied, "Well, that guy gave me some shit, didn't he?" (N.T. 4.31, 4.48). The eight-day trial, however, disclosed virtually no evidence of provocation: petitioner merely asserted that Wilkowski bumped into him as he went through the crowd (N.T. 6.115).

Efforts to revive Wilkowski were unsuccessful, and he was pronounced dead on arrival at the hospital (N.T. 1.164-1.166). The medical examiner determined that Wilkowski's death was caused by a massive hemorrhage due to the tearing of the artery which supplies blood to the brain. This tearing was caused by a blunt injury to Wilkowski's head and neck. (N.T. 5.9-.13)

Procedural Statement:

Since petitioner has not taken the trouble to inform the Court of the procedural history of his case, the Commonwealth is obliged to do so. The lengthy history which follows is, unfortunately, necessary to correct misrepresentations in his petition.

Petitioner was tried before a jury presided over by the Honorable Edwin S. Malmed. After an eight-day trial, on March 10, 1981, the jury convicted petitioner of third degree murder, 18 Pa.C.S.A. §2502(c). Petitioner, who has been out on bail since his conviction, filed boiler-plate post-trial motions. Trial counsel then withdrew, and new counsel filed supplemental motions, including claims of ineffective assistance of trial counsel. After a hearing on the post-trial motions, at which trial counsel testified, Judge Malmed denied the motions on February 4,

1982. On February 17, 1982, after an extensive sentencing hearing, petitioner was sentenced to two and one-half to ten years imprisonment.

Represented by his present lawyer, Robert A. Rovner, Esquire, petitioner filed a direct appeal to the Superior Court, which affirmed in an unpublished memorandum opinion, Commonwealth v. Garvey, No. 713, Philadelphia 1982 (Pa. Super. filed 1/13/84)(Appendix B). The Superior Court's per curiam order is published at Commonwealth v. Garvey, 470 A.2d 1018 (Pa. Super. 1984).

Petitioner then sought discretionary review in the Pennsylvania Supreme Court (Petition for Allowance of Appeal, Appendix D). Pa.R.A.P. 1115 ("... review of a final order of the Superior Court... is not a matter of right, but of sound judicial discretion..."). The Pennsylvania

Supreme Court denied petitioner allowance to appeal on May 1, 1984.

Common Pleas Court Administration notified petitioner by letter of May 24, 1984 that the record in his case had been returned, and directed him to appear before the Honorable Edward J. Blake on June 5, 1984 for commitment on his sentence. On June 1, 1984, to prevent execution of sentence, Mr. Rovner filed an untimely Petition for Leave to File Petition for Reconsideration of his Petition for Allowance of Appeal claiming that he had not received notice of the Supreme Court's denial until on or about May 25, 1984 (petition, together with the proposed reconsideration petition, Appendix E). Pa.R.A.P 1123(b) (applications for reconsideration to be filed within seven days after notice of entry of order denying

petition for allowance of appeal). In clear contravention of the mandate of Rule 1123(b), that "only in the most extraordinary circumstances" will a petition stating "grounds which are confined to intervening circumstances of substantial or controlling effect" be considered, counsel submitted exactly the same issues that had already been rejected by the Pennsylvania Supreme Court. He also ignored the requirements of Rule 1123(b)(2) that the application be accompanied by the certificate of counsel that the application was restricted to the grounds specified in the rule and was "presented in good faith and not for delay." On July 2, 1984, leave to file a petition for reconsideration was denied by Chief Justice Robert N. C. Nix, Jr. of the Pennsylvania Supreme Court. Appendix C. By this ploy, nevertheless, counsel successfully delayed petitioner's

scheduled surrender until August 1, 1984. He also used his untimely and improper reconsideration petition to gain time to file the instant petition for writ of certiorari.

Even before learning of the Pennsylvania Supreme Court's denial of reconsideration, Mr. Rovner filed for state collateral relief under the Post Conviction Hearing Act ("PCHA"), 42 Pa.C.S.A. §§9541-9551, (PCHA petition, Appendix F). In response, the Commonwealth filed an Answer and Motion to Dismiss. On August 1, 1984, the day scheduled for argument on the PCHA petition and for petitioner's surrender, Mr. Rovner alleged that he had filed on petitioner's behalf a petition for writ of certiorari from the Pennsylvania Supreme Court with this Court.

Petitioner's surrender was continued to August 14, 1984 for his attorney to prove that this Court had accepted and docketed his petition for writ of certiorari. On August 14, 1984, Mr. Rovner established that the instant petition had been filed and docketed in the United States Supreme Court on August 7, 1984. As a result, petitioner's surrender and argument on the Commonwealth's motion to dismiss his PCHA petition have been delayed pending the outcome of petitioner's litigation in this Court.

REASONS FOR DENYING THE WRIT

What this petition lacks in coherence and merit it makes up in audacity. Petitioner asks this Court to review claims not properly raised below, abandoned at earlier stages of the litigation, or presently being litigated in collateral review proceedings in state court. Hence, there

has been no final decision on any of petitioner's claims by the highest court of Pennsylvania in which a decision could be had, the Pennsylvania Supreme Court. Petitioner has not properly invoked the jurisdiction of this Court. 28 U.S.C.A. §1257.

A. Petitioner's Claims of Ineffective Assistance of Trial Counsel Have Not Been Presented to the Pennsylvania Supreme Court

Petitioner claims he was denied his constitutional right to representation, citing three supposed instances of ineffective assistance of trial counsel, none of which have been presented to the Pennsylvania Supreme Court for review. See Petition for Allowance of Appeal; Appendix D.

Petitioner abandoned his first contention - that trial counsel failed to object to unspecified hearsay testimony presented by the Commonwealth - after

post-trial motions and presented it neither in his appeal to the Superior Court nor in his subsequent petitions to the Pennsylvania Supreme Court.

His second contention apparently is that trial counsel failed to call as rebuttal witnesses the detectives who took statements from Commonwealth witnesses McMeniman and Reaves, who identified petitioner as the one who struck Wilkowski. Failure to call the detectives similarly was raised in post-verdict motions but was not raised on appeal to the Superior Court or in petitions to the Pennsylvania Supreme Court. A general allegation that trial counsel did not make an adequate pre-trial investigation was raised on appeal to the Superior Court, but with respect to

McMeniman only. Petitioner abandoned even this claim in the Pennsylvania Supreme Court.[1]

Because petitioner has failed to follow the proper course of appellate litigation provided by the state and failed to seek review in the highest court available to him, this Court lacks jurisdiction to review these first two claims. Banks v. California, 395 U.S. 708 (1969); Beaty v. Richardson, 276 U.S. 599 (1928).

Petitioner's final claim of ineffectiveness - that trial counsel failed to question twenty-five eyewitnesses who allegedly can provide exculpatory testimony

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1. Petitioner again raised trial counsel's failure to conduct an adequate pre-trial investigation of McMeniman's testimony in his PCHA petition, however. Appendix F.

- was raised for the first time in petitioner's pending petition for collateral PCHA relief. Since no state court has yet addressed this contention, it is not reviewable by this Court. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Tacon v. Arizona, 410 U.S. 351, 352 (1973). This accusation that trial counsel was ineffective is, moreover, self-defeating: petitioner now claims that "[t]his evidence was not at trial (sic), but surfaced after petitioner had unjustly been convicted of third degree murder." Petition for Writ of Certiorari at 8-9. See Section C below for Respondent's reasons why the related newly discovered evidence claim may not now be reviewed by this Court.

B. Petitioner has Waived Objection to His Meritless Allegation of Prosecutorial Misconduct

Petitioner claims that improper comments by the prosecutor deprived him of

a fair trial. This claim improperly is raised here since, as the Superior Court held, appellate consideration of the issue was waived by trial counsel's failure to object to the prosecutor's remarks at trial. Memorandum Opinion at 2, n.1; Appendix B. Pa.R.A.P. 302(a)("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal"). Failure to raise a federal question in conformance with state procedure is an adequate and independent state ground of decision which bars review in this Court. Henry v. Mississippi, 379 U.S. 443, 446-47 (1965); see also Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978).

Petitioner's contention that the prosecutor's characterization of him as someone "looking for trouble" (N.T. 7.107) and his reference to the punch thrown as a "sucker punch" and a "cheap shot" (N.T.

1.21, 7.106) was raised in an ineffectiveness context on appeal to the Superior Court, in petitioner's request for allowance to appeal to the Pennsylvania Supreme Court, and in his pending PCHA petition. Petitioner, however, has not raised the issue in that context here. Properly raised, it would still be too insubstantial to warrant this Court's review.

The misconduct claim itself is frivolous. The allegedly objectionable comments were perfectly proper characterizations of the evidence adduced at trial. One Commonwealth witness described petitioner as "ready to go into a fight" and "revved up" (N.T. 2.57, 2.58). Another characterized him as a person "looking for trouble" (N.T. 4.95-96, 4.99, 4.101) and the blow as a "[s]ucker punch; the guy wasn't looking. He was looking the

other way." (N.T. 4.105-106). Comments so well supported by the record are not unfair and did not deprive petitioner of a fair trial. United States v. Taxe, 540 F.2d 961 (9th Cir. 1976), cert denied, 429 U.S. 1040, reh. denied, 429 U.S. 1124 (1977) (prosecutor's reference to defendant, charged with record piracy, as a "fraud," "scavenger," and "parasite" supported by the evidence and not unfairly prejudicial). See McDonald v. Tennessee, 486 F. Supp. 550 (M.D. Tenn 1980) (although prosecutor's characterization of defendant as a "bully" and a "coward" may have been objectionable and less than desirable, this did not rise to constitutional significance as clear denial of fair trial).

C. Petitioner's Claim That Newly Discovered Evidence Entitles Him To A New Trial Is Pending In, But Has Never Been Addressed By, The State Courts

Petitioner claims that twenty-five witnesses are willing to testify that Gerald Gontz admitted throwing the fatal punch and that this is newly discovered evidence entitling him to a new trial. Pennsylvania law permits him to seek a new trial based on after-discovered evidence which meets specified criteria. Pa.R.Crim.P. 1123(d)(motion for new trial because of after-discovered evidence must be filed in writing promptly after it is discovered and, when an appeal is pending, may be considered on remand); 42 Pa.C.S.A. §9543(3)(xiii)(a ground for post-conviction relief is "[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.");

Commonwealth v. Ryder, 488 Pa. 404, 412 A.2d 572 (1980); Commonwealth v. Tervalon, 463 Pa. 581, 345 A.2d 671 (1975). Petitioner, however, raised his claim for the first time in state court by presenting it in his PCHA petition filed shortly before the instant petition for writ of certiorari. Appendix F. Remarkably, he asked to defer consideration of this fact-based claim until he had received this Court's review. Since petitioner asks for initial consideration by this Court of an after-discovered evidence claim, he has not properly invoked this Court's jurisdiction. Cardinale v. Louisiana, supra; Tacon v. Arizona, supra.

In sum, since, with respect to each of his claims, petitioner is unable to meet the jurisdictional requirements of 18. U.S.C.A. §1257, that the issues raised be finally decided by the highest state court,

he would be unable, if granted certiorari, to obtain this Court's review of the questions he presents.

CONCLUSION

For the foregoing reasons, respondent, the Commonwealth of Pennsylvania, respectfully requests that the petition for writ of certiorari to the Pennsylvania Supreme Court be denied.

Respectfully submitted,

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V.	:	
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	NO. 84-241

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Respondent, hereby certify that I have served three (3) copies of this Brief for Respondent in Opposition to Petition for Writ of Certiorari by mail delivery upon counsel for petitioner, Robert A. Rovner, Esquire, 175 Bustleton Pike, Feasterville, PA 19047.

Eric B. Henson
ERIC B. HENSON

Sworn to and subscribed before me this 29th day of November, 1984, A.D.

Joyce N. White
NOTARY PUBLIC

WHITE
... Co.
... Sept. 10 1987